UNITED
NATIONS

AT

Administrative Tribunal

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AT/DEC/851
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 851

Case No. 943: GURUN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Sema Gurun, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 28 February, 30 June, 30 September and 31 December 1995 and to 31 March, 30 June and 30 September 1996, the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 September 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"...

9. [i] To rescind the Respondent's decision of 11 August 1994 regarding the Applicant [i.e.,] not to consider her for promotion to the Professional category. ...

[ii] To find:

(a) That the Respondent wrongfully denied her the right to apply for a professional post in accordance with the 'Charter of the United Nations, the Staff Regulations and Rules and the relevant records'.

...

10. [iii] ... to order that the Applicant be entitled to compete and be considered by the relevant promotion bodies for professional posts from the P-1 to the P-3 levels on an equal footing and on the basis of merit with other candidates, external or internal, and not to be penalized for being in the General Service and for being a staff member. ...

[iv] [To] award the appropriate compensation for salary lost due to the non-progression of her career owing to the illegal decision of the Respondent ..."

Whereas the Respondent filed his answer on 6 May 1997;

Whereas, on 30 September 1997, the Applicant filed written observations;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 4 February 1980, as a Clerk/Stenographer, at the G-2 level, on a one-month, short-term appointment for the UN Conference on New and Renewable Sources of Energy. This appointment was successively extended. On 17 March 1980, the Applicant was given a fixed-term appointment for three months at the G-3 level, and transferred to the Special Unit of Palestinian Rights, Department of Political Affairs (DPA), as a Clerk/Typist. After several extensions, her fixed-term appointment became probationary on 17 July 1981. On 1 May 1982, she was given a permanent appointment. With effect from 1 April 1983, the Applicant was promoted to the G-4 level and, on 1 May 1986, to the G-5 level, with a change in functional title to Meetings Services Assistant. From 1 July 1989 through 31 January 1992, the Applicant was on special leave without pay. On her return on 1 February 1992, the Applicant resumed her duties as Meetings Services Assistant.

On 6 May 1993, the Applicant applied for the post of Nongovernmental Organization Liaison Officer, at the P-3 level in

DPA. On 9 June 1993, the Chief, Division of Palestinian Rights informed the Applicant that her "application could not be taken into consideration", in the light of the Organization's position with respect to the promotion to the Professional category of General Service staff members.

On 9 July 1993, the Applicant wrote to the Secretary-General, requesting a review of the decision not to consider her application for the P-3 post.

On 23 August 1993, the Director of Personnel, Office of Human Resources Management, wrote to the Applicant, reiterating that "the only means through which a Secretariat staff member can be promoted from the General Service to the Professional category is through the G [General Service] to P [Professional] examination."

On 20 October 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 27 June 1994. Its considerations and conclusions read as follows:

"Considerations:

8. The Panel determined that the issue before it was whether the decision to bar the Appellant from applying for a P-3 post, on the ground that, being a GS [General Service] category staff member, she cannot be promoted to the Professional category except via the G to P competitive examination, was a violation of her rights under the Staff Regulations and Rules.

9. The Panel based its considerations on the recognition that the Staff Regulations, being enacted by the General Assembly, take precedence over any conflicting Staff Rules promulgated by the Secretary-General.

10. Staff regulation 4.4 provides, in its relevant part, that: 'subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to requisite qualifications and experience of persons already in the service of the United Nations.'

11. In view of this provision, the Panel believes that the right of qualified staff to apply for vacancies cannot be abrogated. With respect to the relevance of the G to P examination in this context, the Panel believes that its purpose is to demonstrate the possession by an applicant of the necessary qualification[s] for a given post, but that such a demonstration is unnecessary where, as in the present case, the applicant is the holder of an advanced University degree, [which was] undoubtedly a requirement for the post in question. Moreover, the applicant had performed for more than one year the functions of the post for which she wished to apply.

12. In the view of the Panel, a staff member should have the same rights as an outsider to be considered on the basis of his or her qualifications for a vacant post and should be judged on the merits by the office where the vacancy exists.

13. The Panel noted that the Appellant had received excellent performance evaluation reports, including during the time she served in the post for which she was not permitted to apply.

14. In the light of the above considerations, the Panel holds that the Appellant was wrongly prevented from applying for the post in question.

Recommendation:

15. The Panel therefore unanimously recommends that the Appellant be permitted to apply for the P-3 post in question if it is still unfilled, or for any other post for which she possesses the necessary qualifications."

On 11 August 1994, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her as follows:

"Although the Secretary-General has given careful consideration to the Board's concerns regarding the G to P competitive examination in general and as it applies to your particular case, he cannot accept the Board's recommendation as it is contrary to General Assembly resolutions which provide for promotion of General Service staff to the Professional category by way of competitive examination only. The Secretary-General has found that staff regulation 4.4, cited by the Board, does not override these resolutions.

Based on the above, the Secretary-General has decided to take no further action in your particular case. However, the concerns raised in your appeal will be given consideration in the context of the ongoing review of the competitive examination system."

On 30 September 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent wrongfully denied the Applicant the right to apply for a professional post in accordance with the Charter and the Staff Regulations and Rules.

2. The Respondent's failure to observe his obligations under the Charter, the Staff Regulations and Rules, and the relevant General Assembly resolutions also contravened the principle of equality and constituted illegal discrimination on the basis of the Applicant belonging to the General Service category of staff.

Whereas the Respondent's principal contentions are:

1. The G to P competitive examination was established on the basis of, and in conformity with, the applicable resolutions of the General Assembly. The system forms part of the terms of employment of staff.

2. The G to P competitive examination does not violate the Applicant's rights.

The Tribunal, having deliberated from 5 to 25 November 1997, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board (JAB). She argues that the decision to bar her from applying for a

P-3 post on the ground that, as a General Service category staff member, she could not be promoted to the Professional category except via the G to P competitive examination, violated her rights under the United Nations Staff Regulations and Rules.

II. The Respondent relies in large part on resolution 33/143, adopted on 20 December 1978 by the General Assembly of the United Nations, to contend that his decision not to accept the JAB's recommendation was in conformity with applicable United Nations resolutions. General Assembly resolution 33/143 states, inter alia:

> "(g) Movement of staff from the General Service category to Professional category should be limited to P-1 and P-2 levels and be permitted up to 30 per cent of the total posts available for appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years' experience and post-secondary educational qualifications;"

III. In examining this resolution, the Tribunal notes that in its preamble, the General Assembly called upon the Secretary-General and all the United Nations organizations "to put an end to any form of discrimination based on sex, as laid down in Article 8 of the Charter of the United Nations, in conditions of employment, recruitment, promotion and training and to ensure that the opportunities for employment and promotion of women in the United Nations system are equal to those of men."

Article 8 of the Charter of the United Nations provides that:

> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

One of the goals of this resolution was to put an end to discrimination based on sex in the conditions of employment and promotion. The Tribunal has recently considered the issue and has held that "since the competitive examination places no improper restriction on the eligibility of any staff member for the competitive examination, it raises no questions under Article 8 of the Charter." (Cf. Judgement No. 722, Knight et al, para. X (1995)).

IV. General Assembly resolution 33/143 states that "competitive methods" must be used to select a candidate from the General Service category for professional level posts. The Applicant holds an advanced University degree and has received excellent performance evaluation reports. Nevertheless, the Tribunal finds that promoting a General Service candidate to the Professional category by other avenues than those expressly provided by the General Assembly resolution would run counter to the wording and spirit of the resolution. As explained by the Tribunal in Judgement No. 722, Knight et al (1995):

> "... since the General Assembly introduced the system regulating promotion from the General Service category to the Professional category through the competitive examination and since the Tribunal had upheld the legality of the system in Judgement No. 266, Capio (1980), there is no valid basis for challenging its legality. ...
>
> V. The Tribunal has had a number of occasions to consider the competitive examination system, most recently in Judgement No. 694, Chen (1995), but has had no reason to question its legality or to reconsider the Capio decision. The Applicants in this case briefly refer to Capio; they do not ask that it be reconsidered, and the Tribunal will not do so."

V. A further argument that the Applicant advances is that the requirements of the G to P exams can be disregarded by non-staff members who can sit for the national competitive examinations to

enter the Professional category. This suggests a situation whereby the Applicant's chances for promotion to the P-3 level would be greater if she were an external candidate. When the Applicant wanted to apply for the P-3 post, she was unable to do so due to her own refusal to sit for the G to P examination. As a consequence, she may have been at a disadvantage with respect to external candidates who had passed the exam. However, the Tribunal can bear no responsibility for circumstances which were of the Applicant's own making. In addition, the national competitive examinations are, in any event, identical - both in form and in substance - to the G to P exams. This demonstrates that the means for serving the Organization as a Professional staff member have been evenhandedly applied. Everyone, whether internal or external, must take the same exam to become a Professional staff member at the P-1 and P-2 levels.

VI. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary